

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE FRANCISCO RODRIGUEZ,

Defendant and Appellant.

G032290

(Super. Ct. No. 01CF1846)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William Lee Evans, Judge. Affirmed.

Nancy Olsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Holley A. Hoffman and Maxine P. Cutler, Deputy Attorneys General, for Plaintiff and Respondent.

*

*

*

The jury convicted defendant, Jose Francisco Rodriguez, of assaulting Eluterio Ruiz and Cesar Aguilar by means of force likely to produce great bodily injury (Pen. Code § 245, subd. (a)(1)),¹ two counts of attempted second degree robbery (§§ 664, 211, 212.5, subd. (c) & 213, subd. (a)(2)), and street terrorism (§ 186.22, subd. (a)). The jury also found true the allegation defendant had inflicted great bodily injury upon Ruiz. (§ 12022.7.)²

In a bifurcated proceeding, the court found true the allegation that in September 2000, defendant was convicted of making criminal threats (§ 422), a serious or violent felony within the meaning of sections 667, subdivisions (d) and (e)(1), and 1170.12, subdivisions (b) and (c)(1).

Defendant contends the court committed prejudicial error when it denied his motion for a mistrial and his alternative motion to strike part of the basis for the prosecution's gang expert's opinion. He also contends there was insufficient evidence to convict him of street terrorism; the court committed prejudicial error when it misspoke while instructing the jury with CALJIC No. 6.50; and the court violated his constitutional right to due process of law by allowing into evidence Ruiz's pretrial identification of defendant's photograph. We disagree with all of his contentions and affirm the judgment in its entirety.

¹ All further statutory references are to the Penal Code unless otherwise stated.

² The jury hung on the allegations defendant had committed the criminal acts in furtherance of a criminal street gang (§ 186.22, subd. (b)(1)). The court declared a mistrial as to those enhancement allegations and dismissed them pursuant to section 1385.

FACTS

Ruiz and Aguilar were washing their clothes at a Santa Ana laundromat when defendant and Jesus Soto approached on their bicycles. Seeing Aguilar standing in front of the laundromat, Soto began asking him for beer money. When Ruiz came out of the laundromat to see what was happening, defendant began demanding money from both of them. Despite Ruiz and Aguilar telling defendant they had no money, defendant threatened to beat them up if they did not comply. Following through on his threat, defendant stabbed Ruiz on the side of his face, resulting in a one and one-half inch gash that went through his lower lip into his mouth. Soto attempted to stab Aguilar in the chest but Aguilar was able to evade injury.

Ruiz testified he could not remember what happened to him, nor could he remember whether it was defendant or Soto who injured him. However, Ruiz did recall that both assailants appeared to be drunk and smelled of liquor, and that he was particularly afraid of defendant because defendant had a knife in his hand and acted very “aggressive.”

Aguilar testified with better recall. He described both assailants as having shaved heads and wearing similar plaid shirts. According to Aguilar, defendant was the more aggressive of the two assailants. Before any physical interaction occurred, defendant told Aguilar “You’re a macho, but you’re going to see with me what I can do.” Aguilar thought defendant was going to assault him first, but when Ruiz approached, defendant punched Ruiz in the jaw and knocked him to the ground. Aguilar wasn’t sure how Ruiz received the gash on his face. He thought Ruiz might have injured himself when he fell against the laundromat door.

Santa Ana Police Officer Randy Saunders, and his partner Mike Gonzalez, observed Aguilar standing in the street trying to flag down assistance. Ruiz was standing on the sidewalk holding his bleeding face. Aguilar told Gonzalez two Hispanics with

shaved heads had assaulted Ruiz. Two to three minutes later, Saunders found defendant and Soto four blocks away from the laundromat riding their bicycles in a school playground. When they saw Saunders they fled. Saunders followed them in his patrol car and ordered them to stop. Defendant complied, but before Soto complied, he placed something in the branches of a tree. When Saunders searched the tree he found a knife. The blade of the knife was three to four inches long and was in a locked position. Saunders also observed defendant had a cut on his right hand.

Ruiz identified defendant as his assailant during a two-person field show up conducted by Gonzales. Some four months later, Officer Martinez re-interviewed Ruiz because Gonzales had been recalled to military duty. At the end of the interview Martinez showed Ruiz a booking photograph of defendant that was folded in such a way as to cover any identifying information. Martinez asked Ruiz if he knew who the person in the photograph was. Ruiz identified defendant as the person who stabbed him.

Gang Testimony

Santa Ana Police Officer Ronald Castillo, an 18-year member of the Santa Ana Police Department, and an eight and one-half year veteran of its gang unit, testified as the prosecution's gang expert. Castillo concluded defendant was an active member of the Alley Boys gang at the time of the offenses, and the crimes were committed to promote the Alley Boys gang. Castillo further opined Soto was an active member of the Brown Thugs gang. The Brown Thugs was a gang aligned with the Alley Boys, and the instant offenses were committed in Loper gang territory, a gang aligned with both the Alley Boys and the Brown Thugs.

According to Castillo, the Alley Boys gang has been around for close to 20 years. Its primary activities involve assaults with deadly weapons, attempted murders, and drug related offenses. In his opinion, it is not unusual for a member of one gang to commit a joint crime with a member of an aligned gang.

Castillo also testified about gang culture. For example, when a person claims to be a member of a particular gang, the police consider it a reliable claim. Gang members do not admit to membership in a gang if it is not true, and if actual members find out about a false claim they will punish the impostor. Violence is a predominate part of gang culture. If a gang member generates fear in others, he is greatly respected within the gang and becomes a powerful member. However, disrespect of a member in any form lowers a gang member's status within the gang. Gang members thrive on instilling fear in non-gang members and do so by committing violent acts. The more violent the act, the more respect the member and his gang receives. Castillo explained that if a gang member demands money from a non-gang member and is unsuccessful, the gang member has been "disrespected" and will lose face within the gang. To maintain respect the member will commit a violent act against the person who refused to accede to his demands.

Castillo opined the assaults and attempted robberies were committed to promote the Alley Boys gang. Respect for the gang was reestablished when defendant stabbed the victim after being rebuffed in his attempt to rob him. Castillo opined it was a "classic" gang-related crime because the gang member needed to commit a violent act in order not to lose face. Further, because the assaults and attempted robberies were committed in front of a younger member of the Brown Thugs gang, the reputation of the Alley Boys for being "tough" was elevated. An Alley Boys member had demonstrated to another gang member he was able to commit a violent crime with no provocation.

Castillo based his opinion on several items of information. One month before the assaults on Ruiz and Aguilar, defendant had admitted membership in the Alley Boys gang to a police officer when the officer contacted defendant in the presence of a Brown Thugs member in Loper gang territory. Defendant also had admitted membership in the Alley Boys to Officer Saunders after his arrest for the Ruiz and Aguilar assaults. Further, the crimes were committed in a familiar gang territory.

Castillo also reviewed Santa Ana Police Department records, other law enforcement agency reports, personal interviews, and reported contacts with defendant's brother who was also a documented Alley Boys gang member. Included in this material were gang notices or "Notices of Determination" that had been served on defendant. Castillo explained the purpose of a gang notice — to advise a person that the gang in which membership is claimed is a criminal street gang, and if the association is continued gang enhancements can be charged if the person is arrested for a gang-related crime. Castillo also explained a second part of the notice is kept by the police department for the purpose of listing information about the gang member such as individual characteristics, tattoos, home address, admission of gang membership, gang graffiti on articles of clothing, and a photo and thumbprint of the gang member.

Defendant had been served with two Notices of Determination. The first was served in 1999 after defendant admitted membership in the Alley Boys. The second was served in March of 2000 when defendant was questioned about his gang membership and he replied, "They have me down as an Alley Boy." He also admitted his brother was a member of the gang, and told the police that gang members hung out at his house.

Castillo also relied on reports documenting defendant's prior gang incidents. During the course of an investigation in 1996, defendant admitted "kicking back with the Alley Boys for three years." At that time, he stated he was not "jumped in" because his brother was already a member. In another 1996 report he admitted membership in the Alley Boys gang and said his moniker was "Little Shadow." In 1999, defendant was found with a phone book containing Alley Boys phone numbers and assorted gang monikers. In July of 2000, defendant was arrested, and in his possession police found a piece of paper containing the letters "ABR," standing for the words "Alley Boys Rifa," meaning Alley Boys are "number one," as well as defendant's gang moniker, "Little Shadow." Lastly, Castillo also relied on a report indicating defendant had three gang tattoos on his body. Two of the tattoos were the letters "O" and "C." This

advertised defendant's "home base" as Orange County. The other tattoo consisted of three dots meaning, "My Crazy Life." Gang members commonly wear this tattoo.

As to Soto, Castillo opined he was an active member of the Brown Thugs gang because Soto had previously received three Notices of Determination, and, in June 2001, had admitted being a member of the Brown Thugs gang for two and one-half years. Soto also had "Brown Thugs" tattooed on his upper chest.

DISCUSSION

I

The Court Did Not Abuse Its Discretion by Denying Defendant's Motion for a Mistrial and His Alternative Motion to Strike Portions of Castillo's Testimony

During Castillo's direct examination, defendant objected to his testimony regarding the content of a July 2000 report by the Orange Police Department. Castillo testified: "The Orange Police Department conducted an investigation and arrested Mr. Rodriguez as a result, and at the time of his arrest a piece of paper was found on him with . . . ABR written on it, which is Alley Boy graffiti, along with the moniker of Little Shadow." Castillo had earlier explained the letters "ABR" stood for "Alley Boys Rifa" and "Little Shadow" was defendant's moniker. That was Castillo's entire testimony about the July 2000 police report. But defendant moved for a mistrial arguing the report had not been included in the prosecution discovery packet provided to the defense, and, although the omission of the police report had been unintentional, it was nevertheless prosecutorial misconduct requiring the case to be mistried.

Defendant moved alternatively to strike this snippet of Castillo's testimony on the same grounds, and because the evidence was not relevant to his opinion, was more prejudicial than probative in that it disclosed to the jury defendant had been arrested, and

because the report contained unreliable information, i.e., an incorrect report by defendant's probation officer that defendant had a gang name tattooed on his body.³

The court denied both motions. While acknowledging the prosecution should have provided the report to the defense, the court found no prejudice had been suffered because the same information regarding the letters "ABR" and defendant's moniker were in evidence from a number of other sources. As the court stated, "I don't think the jury's heard anything new or anything they would not have otherwise heard, so I don't see that there's any prejudice that's been created."

In regard to the motion to strike, the court noted defendant had information about the July 2000 incident from the court file in that case, and "other than the fact that you would have had the police report so you knew exactly what [Castillo's] source came from, I don't see that it would have changed what in fact became the testimony." Following the ruling, defense counsel asked for Castillo's testimony to be read back, and after hearing the actual testimony (not the imagined or perceived testimony), defense counsel remarked, "Is that all that came out of the Orange - - -." To which the prosecutor answered, "Yes," and the court said, "All right, Let's get the jury in here."

Defendant contends the court committed prejudicial error by denying his motion for a mistrial and his motion to strike. We disagree.

³ Although defendant argued in the trial court, and again on appeal, about the asserted prejudice he suffered from statements made by defendant's probation officer, which were contained in the police report, those statements were never in evidence and were never mentioned in front of the jury. The *only* information from the July 2000 report made known to the jury was the fact of defendant's arrest and the discovery of the piece of paper in his possession. We see no need to discuss defendant's argument concerning information that was never disclosed to the jury.

1. Standard of Review

“A motion for mistrial is directed to the sound discretion of the trial court. . . . ‘[A] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.’” (*People v. Jenkins* (2000) 22 Cal.4th 900, 985-986.) Accordingly, we review for abuse of discretion.

We also review the ruling on the motion to strike for abuse of discretion. “A trial court’s exercise of discretion in admitting or excluding evidence is reviewable for abuse. [Citation.] Abuse may be found if the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner, but reversal of the ensuing judgment is appropriate only if the error has resulted in a manifest miscarriage of justice.” (*People v. Coddington* (2000) 23 Cal.4th 529, 587-588, disapproved on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

2. The Court’s Denial of the Motions Did Not Result in an Unfair Trial

a. The asserted discovery violation was not prejudicial.

First, we conclude the court’s denial of defendant’s motions on the ground of prosecutorial misconduct was not an abuse of discretion. Even defendant’s counsel acknowledged the prosecutor was not aware Castillo would refer to the July 2000 police report in his testimony. And once the document was made available to counsel, she was given time over the lunch hour to review it. While acknowledging the report should have been made available to the defense, the court correctly observed the jury had already heard the information regarding defendant’s association with the gang, the initials “ABR,” and his gang moniker from other sources. These sources included Santa Ana police reports dating as far back as 1996 and reflected defendant’s statements he had been “kicking back” with the Alley Boys since at least 1993, still claimed membership in May

2001, and admitted Alley Boys membership to a police officer after the Ruiz and Aguilar assaults. In one 1996 report defendant admitted both his membership in the Alley Boys and his moniker “Little Shadow.” And the bare fact of defendant’s arrest could not have come as a surprise. Defendant had already obtained rulings from the court concerning the potential evidentiary use of the fact of his conviction resulting from this same July 2000 arrest.

Finally, any possible prejudice resulting from the use of the undisclosed report was cured when the court instructed the jury about disclosure obligations and the inference that may be drawn from the failure to make timely disclosure. Using CALJIC No. 2.28, the court instructed: “In this case, the People failed to timely disclose the following evidence: [¶] An Orange Police Department report dated, July 28, 2000, containing information about a paper found on the defendant with the letters ABR, and the words, Little Shadow, on it along with other names and some phone numbers. [¶] Although the People’s failure to timely disclose evidence was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial. [¶] The weight and significance of any delayed disclosure are matters for your consideration. However, you should consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial or subject matters already established by other credible evidence.”

Section 1054.5, subdivision (c) provides that exclusion of the testimony of a witness as a sanction for a discovery violation should only be done if all other sanctions have been exhausted, unless the court is required to do so by the Constitution of the United States. This is not such a case. The prejudice, if present at all, is imperceptible to the objective observer. Any lingering doubt about prejudice flowing from the non-disclosure was cured by the court’s admonition.

b. The mention of defendant's arrest was not prejudicial.

Apart from the asserted discovery violation, defendant also contends a mistrial should have been declared, or the testimony stricken, because of Castillo's reference to defendant's arrest by the Orange Police Department. Defendant argues the information about the arrest, coupled with the concurrent discovery of gang material, created "an erroneous and impermissible inference [defendant] was convicted of some prior gang-related offense." Assuming the arrest should not have been mentioned in front of the jury, the impact of this fragment of testimony was virtually nonexistent, far removed from being incurably prejudicial. The testimony did not reveal the facts leading to the arrest, and the report was never offered into evidence. This single event was virtually lost in Castillo's recital of defendant's numerous contacts with the police upon which he relied in forming his opinions. Castillo's testimony about the piece of paper with the gang information having been found in defendant's possession was clearly a proper part of the basis for his ultimate opinion of defendant's gang membership. (See *People v. Catlin* (2001) 26 Cal.4th 81, 137.) Because the evidence of the assaults, attempted robberies, and street terrorism was so strong, we conclude it is not reasonably probable defendant would have obtained a more favorable result if the court had stricken the embedded reference to defendant's July 2000 arrest. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II

Substantial Evidence Supports Defendant's Conviction for Active Participation in a Criminal Street Gang

Defendant contends the evidence was insufficient to support his conviction for street terrorism under section 186.22, subdivision (a). He argues the prosecution failed to prove he "actively participated" in a criminal street gang, or that he either

directly or actively committed, or aided and abetted another member of the Alley Boys gang in committing the instant offenses. We disagree with both arguments.

“In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) We apply the same standard to convictions based largely on circumstantial evidence. (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745.) And it is not within our province to reweigh the evidence or redetermine issues of credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

1. Substantial Evidence Supports the Active Participation Element of Section 186.22, Subdivision (a)

Section 186.22, subdivision (a) states: “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang” is guilty of a crime.

In *People v. Castenada* (2000) 23 Cal.4th 743, the California Supreme Court affirmed a conviction for violation of section 186.22, subdivision (a) against a contention the evidence was insufficient to show active participation in a gang. In *Castenada*, the prosecution presented evidence the defendant’s current crime was the type usually committed by Goldenwest gang members; the current crime was committed in gang territory; the defendant had seven prior documented contacts with Goldenwest gang members during the 14-month period before the crime; and on four of those seven occasions the police gave defendant notice that Goldenwest was a criminal street gang,

but defendant nevertheless admitted and bragged about the extent of his gang association. Based on the defendant's own admissions, the evidence of prior contacts, and the nature of the current offense committed, the Court in *Castenada* concluded there was substantial evidence to establish active participation in a criminal street gang. (*Id.* at pp. 752-753.)

Here, Castillo opined defendant was an active member of the Alley Boys gang at the time he committed the instant crimes based on gang evidence similar to that relied upon in *Castenada*. The crimes were committed in Loper territory, an allied gang, along with a member of another aligned gang, the Brown Thugs. Castillo's opinion was supported by his review of Santa Ana Police Department records, other law enforcement agency reports, Notices of Determination, field interview cards, and personal interviews that established defendant, like the defendant in *Castenada*, admitted gang membership on numerous occasions, including an admission just one month before the charged crime, and an admission immediately following the charged crime. Officer Castillo's "fact-based specific opinion and instances of past criminal activities" (*People v. Augborne* (2002) 104 Cal.App.4th 362, 373), constituted substantial evidence supporting the jury's implied finding the defendant actively participated in the Alley Boys gang.

2. Substantial Evidence Supports the Furtherance of Felonious Criminal Conduct Element of Section 186.22, Subdivision (a)

Defendant also contends there was insubstantial evidence to support a finding that he willfully promoted, furthered, or assisted in felonious criminal conduct by members of the Alley Boys gang. Defendant appears to base his improbable argument on a belief that section 186.22, subdivision (a) applies *only* where defendant furthered felonious criminal conduct by *another* member of his gang. Under defendant's theory, he would incur criminal liability under the statute only if he were an aider and abettor of another member of his gang in the commission of the offense, but not if he directly committed the offense himself.

We “give statutory words their plain or literal meaning unless that meaning is inconsistent with the legislative intent apparent in the statute.” (*People v. Allen* (1999) 21 Cal.4th 846, 859.) We agree with our colleagues of the Fifth District Court of Appeal that interpreting section 186.22, subdivision (a) so that only an aider or abettor is subject to liability, but a direct perpetrator is not, “would be a misconstruction of the statutory language and a perversion of the legislative intent.” (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 437.) In our view, the *Ngoun* court correctly concluded the statute “applies to the perpetrator of felonious gang-related criminal conduct as well as to the aider and abettor.” (*Id.* at p. 436; accord, *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) That defendant’s commission of the assault on Ruiz and Aguilar was gang-related was amply supported by Castillo’s testimony regarding gang culture. In the world of gangs, when a gang member demands money from an ordinary citizen, and is rebuffed, the gang member “needs to meet this challenge. He’s been disrespected. It lower[s] his status within the gang, and he has to do something about it.” This testimony was sufficient evidence from an expert by which the jury could find defendant was required to commit the assault to maintain respect within his gang.

Thus, assuming all other elements of section 186.22, subdivision (a) are satisfied, i.e., active, knowing participation in a criminal street gang, defendant’s direct commission of a gang-related crime is sufficient to convict. Under these circumstances, defendant has furthered felonious criminal conduct by a member of his gang, namely, himself. Substantial evidence supports the verdict.

III

The Jury Was Properly Instructed With CALJIC No. 6.50

Defendant contends the court prejudicially erred while reading CALJIC No. 6.50 by incorrectly using the word “a” instead of “that” in stating the fourth element of section 186.22, subdivision (a). As relevant to defendant’s argument, CALJIC No. 6.50 states: “In order to prove this crime, each of the following elements must be proved: [¶] 1. A person actively participated in a criminal street gang; [¶] 2. The members of that gang engaged in or have engaged in a pattern of criminal gang activity; [¶] 3. That person knew that the gang members engaged in or have engaged in a pattern of criminal gang activity; and [¶] 4. That person either directly and actively committed or aided and abetted [another] member of *that* gang in committing the crime[s] of Assault with Force Likely to Produce Great Bodily Injury, Assault with a Deadly Weapon, or Attempted Robbery.” (Italics added.)

The transcript reflects the jury was actually instructed on the fourth element with the following: “Four, the person either directly or actively committed or aided and abetted another member of *a* gang in committing the crimes of assault with force likely to produce great bodily injury, assault with a deadly weapon, or attempted robbery.” (Italics added.) By substituting “a” for “that,” defendant argues the jury was permitted to convict him of the section 186.22, subdivision (a) violation based on a theory he aided and abetted a member of a different gang, the Brown Thugs, not his own Alley Boys gang.

Although defendant did not bring the asserted error to the attention of the court by making an objection, we nevertheless review instructional error if it affected defendant’s “substantial rights” (§ 1259), and we equate “substantial rights” with “reversible error.” (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 649.) Accordingly, we address the merits of defendant’s claim of instructional error. (*People v. Prieto* (2003) 30 Cal.4th 226, 247.)

From our review of the evidence in this case, it is clear the prosecution never attempted to prove these crimes were committed for the benefit of the Brown Thugs gang (§ 186.22, subd. (b)). And although the prosecution argued that defendant aided and abetted Soto's criminal conduct so as to prove defendant's guilt of the assault and attempted robbery of Aguilar, it did *not* argue defendant's aiding and abetting conduct could be used as evidence in support of the section 186.22, subdivision (a) violation. The prosecution's presentation of Castillo's testimony clearly made the distinction. The prosecutor asked a hypothetical question paralleling the People's version of the facts in evidence and asked, "Does that conduct promote, further, or assist criminal conduct by Alley Boys?" Castillo answered, "It helps promote and further the conduct of the Alley Boys gang." A similar question was not asked with respect to the Brown Thugs.

Further, the introductory paragraph of CALJIC No. 6.50 states: "Every person who actively participates in any criminal street gang with knowledge that the members are engaging in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of *that* gang, is guilty of a violation of . . . section 186.22, subdivision (a), a crime." (Italics added.) And the court did *not* misspeak when it read this portion of the instruction.

Finally, the court made all of the instructions available to the jurors in written form for their use during deliberations, including a correctly worded CALJIC No. 6.50. It is also apparent the jurors actually consulted the written version of CALJIC No. 6.50 provided to them, as evidenced by a specific question from the jury asking for further clarification of another part of that instruction.

We are satisfied from a review of the evidence presented, the manner in which it was presented, the arguments of counsel, the entire language of CALJIC No. 6.50, and the availability of the correctly worded instruction in the jury room, there was

no possibility the jury was confused by the court's slip of the tongue.⁴ "Although an instruction, or in this case a portion of an instruction, might by itself be misleading, the potentially misleading instruction should not be reviewed in isolation. It is proper to review the instruction in combination with other instructions and/or the argument of counsel in determining if the instruction challenged on appeal confused the jury." (*People v. Jaspas* (2002) 98 Cal.App.4th 99, 111.) Defendant was not prejudiced by the court's misspeak.

IV

Ruiz's Photo Identification Was Not Unduly Suggestive

Defendant contends the court violated his federal constitutional right to due process by allowing Officer Martinez to testify regarding Ruiz's pretrial photographic identification of defendant. We disagree.

During a hearing outside the presence of the jury, Martinez testified he re-interviewed the victim Ruiz some four months after the crimes took place for the purpose of corroborating Officer Gonzalez's earlier report. Gonzalez had been present when defendant and Soto were apprehended, and Gonzalez had been the only person present when Ruiz identified defendant as the person who stabbed him during a two-person field show up. But Gonzalez had been recalled to active military duty and Martinez was brought in to take over Gonzalez's responsibilities. Martinez familiarized himself with Gonzalez's report, and then interviewed Ruiz and Aguilar to corroborate matters contained in the report.

⁴ Of course, we cannot know for certain whether the court misspoke or whether the court reporter erred. And since the matter was not brought to the court's attention at trial, it appears the possibility of error emerges only from a fastidious reading of the transcript.

Defendant objected to the testimony of Officer Martinez regarding Ruiz's identification of defendant's photo on the ground it was unduly suggestive. According to defendant's argument, the identification process was flawed because Ruiz was presented with only the booking photo of defendant rather than a photographic lineup ("six-pack"), a subsequent live lineup, or pictures of both defendant and Soto.

Martinez explained that he showed Ruiz a booking photograph of defendant at the end of his interview, and asked Ruiz, "Do you know who this person is?" Ruiz answered, "That's the person who stabbed me." Martinez also testified he had folded the photograph in such a way as to cover any identifying information.

Before hearing Martinez's testimony regarding Ruiz's identification the court said: "The foundation for admissibility by photograph is making sure it was not unduly suggestive and that there was an identification made by the free will of the person, without any unduly suggestive nature. That's why you do a six-pack, so you can have a choice. [¶] So the one person photograph does get back into the concern the court would have to solve, and that's whether or not it was unduly suggestive at the time, the manner in which it was done under all the circumstances surrounding it."

After hearing the testimony of Officer Martinez the court ruled: "I don't think what I've heard rises to the level of being an unduly suggestive lineup in which the potential for misidentification has occurred. I think that all of the facts of how it occurred are for the jury to consider the weight, and it isn't one of those that goes to the level of making it totally inadmissible. . . . It's necessary for the court to make the foundational finding, and I do find that there appears to be a sufficient foundation to have the matter go to the jury, that it isn't tainted by an unduly suggestive process that would lead to a misidentification, and it would be for the jury to determine the weight to be given to any prior identification." Under the totality of the circumstances, the court did not abuse its discretion nor did it deprive defendant of his rights to due process of law.

“A pretrial identification procedure violates a defendant’s due process rights if it is so impermissibly suggestive that it creates a very substantial likelihood of irreparable misidentification. The defendant bears the burden of proving unfairness as a ‘demonstrable reality,’ not just speculation. [Citations.] [¶] On review we must consider the totality of the circumstances to determine whether the identification procedure was unconstitutionally suggestive. We must resolve all evidentiary conflicts in favor of the trial court’s findings and uphold them if supported by substantial evidence.” (*People v. Contreras* (1993) 17 Cal.App.4th 813,819.)

Some of the factors utilized in evaluating the likelihood of irreparable misidentification include: the opportunity of the witness to view the suspect at the time of the offense, the witnesses degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.)

Here, the pretrial identification made by Ruiz was not performed under unduly suggestive circumstances. Ruiz had already identified defendant to Officer Gonzalez at the time the offense occurred. Ruiz’s identification of defendant and his recollection of the events when interviewed by Officer Gonzales at the time of the crime were consistent with his later identification of defendant and his recount of the events to Officer Martinez. In addition, before Martinez showed defendant the photograph, defendant had already identified defendant by describing the clothing he was wearing at the time of the crime. The totality of the evidence supports the court’s determination that the photo identification was not unduly suggestive. Defendant’s due process rights were not violated.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.